IN THE HIGH COURT OF JUDICATURE
AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 1034 OF 2005
IN
SUIT NO.468 OF 1999

ICICI Bank Ltd. ...Plaintiff
Vs.
Jayant Vitamins Ltd. ...Defendants

Mr.Pradeep Sancheti i/b. Thakorda Madgaonkar Advocate for Applicant.
Ms. Rajashree Rastogi i/b. M.K.Ambalal Advocate for Plaintiff
Ms. Swati Deshpande i/b. M.S.Bodhanwala Advocate for Defendant No.2
Mr.Prashant Naik i/b. Mr. T.R. Naik Advocate for Defendant No.3
Mr. Sanjay Jain i/b. Purnanand & Co. Advocate of Defendant No.7
Mr. R.J. Mane A.G. P. for Respondent No.9.

CORAM: SMT. ROSHAN DALVI, J.
DATED: 23RD JUNE, 2006

P.C.

1. This Notice of Motion is taken out by the defendant no.7 for discharging the Court Receiver already appointed and in the alternative to sell 10 shares bearing nos.91 to 95 and 746 to 750 comprised

in share certificate no.19 and 150 in Raheja Centre Co-operative Society Ltd. At Nariman Point, Bombay-21 along with 2 car parking space nos.23 and 27 in the compound of the Raheja Centre Building.

2. The Plaintiffs as Debenture Trustees, claim a floating charge upon all the properties, movable and immovable, of defendant no.1 including the above premises. The suit is filed upon the Debenture Trust Deed dated 3rd January, 1992 under which a mortgage by deposit of title deeds is created by defendant no.1 in favour of the plaintiffs. The defendant no.1 has further made a declaration to create a charge on the mortgage on all the immovable properties at Ratlam in favour of the plaintiffs also on 3rd January, 1992 itself. An agreement of hypothecation, and a Deed of Undertaking cum Indemnity have interalia been executed by defendant no.1 in favour of the plaintiffs on 27th November, 1992.

3. Consequently the plaintiffs have claimed right and interest interalia the above property under the aforesaid documents.

4. Defendants 2 to 6 who are other financial institutions, also claim separate charge on the premises.

5. The defendant no.7, who has taken out this Notice of Motion, claims rights initially under an unregistered agreement to mortgage dated 16th August, 1998 and a Memorandum of Understanding (MOU) and Leave and License Agreement (L&L) dated 9th September, 1999.

6. The suit came to be filed on 21st January, 1999. Court Receiver came to be appointed Receiver interalia of the above premises by orders dated 9th August, 2002 and 17th March, 2002. Consequently it is seen that prior to the filing of the suit by the plaintiffs and obtaining any interim reliefs thereon, the aforesaid 2 transactions were the only transactions between the defendant no.1 and defendant no.7. Both these transactions are under unregistered documents.

7. Defendant no.1 and defendant no.7 have executed a registered Indenture of Mortgage on 4th

February, 2003, about 4 years after the filing of this suit. The said mortgage has also been registered with the ROC on 11th February, 2003.

8. On 8th February, 2003 defendants 1 and 7 have entered into a Leave & License Agreement in respect of the above premises. Under this agreement defendant no.7 claims to be in possession. The agreement is for 33 months. It expired by afflux of time on 7th November, 2005.

9. A month after the execution of the Leave and License agreement on 12th March, 2003 defendant no.1 agreed to sell the above premises, (which was mortgaged to defendant no.7) to defendant no.7 for a price not less than 1.5 crores to be utilised towards satisfaction of the mortgage loan and the balance, if any, to be refunded to the defendant no.1. The letter of defendant no.1 dated 12th March, 2003 is marked as Exhibit-G to the affidavit in support of this Notice of Motion. It shows an endorsement of receipt (presumably by defendant no.7) dated 12th May, 2003, 2 months after the date of the letter.

10. Court Receiver has taken formal possession of the above premises from defendant no.7 on 27th June, 2003 as per the receipt of handing over possession signed by the Director of the defendant no.7. The said receipt annexed as Exhibit-H to the affidavit in support of the Notice of Motion records a statement of defendant no.7 that they will not part with possession of the said premises to any third party until further orders of the Court.

11. It is in view of the afforesaid chronology that this Notice of Motion is required to be considered. The plaintiffs have challenged the validity of the mortgage executed by defendant no.1 in favour of defendant no.7. That fact is apparent from the order dated 19th October, 2004 of S.J.Vazifdar, J) in the Chamber Summons taken out by the defendant no.7 for being impleaded as a party defendant and which is annexed to the affidavit Exhibit-I in support of Notice of Motion.

12. The chronology shows that the first 2 documents between defendants 1 and 7 which are prior to the filing

of the suit and appointment of Court Receiver are unregistered and hence inadmissible in evidence. The transaction of the defendant no.1 with the plaintiffs initially under the Debenture Trust Deed dated 3rd January, 1992 is therefore prior in point of time. The defendant no.1 had already mortgaged the above premises to the plaintiffs since 1992.

13. The registered Indenture of mortgage in favour of defendant no.7 is dated 4th February, 2003. It is therefore, not the first charge created in favour of defendant no.7. Consequently it is subject to the earlier charges.

14. In fact aside from the plaintiffs, defendants 2 to 6 who are other financial institutions also claim similarly against defendant no.1.

15. Well after the filing of the suit and appointment of Court Receiver the defendant no.1 has written to the defendant no.7 instructing them to sell of the above premises.

16. Despite defendant no.7 himself applying for alternative reliefs of discharge of the Court Receiver or sale of the above premises, defendant no.7, claims a right of possession therein under the Leave and License Agreement dated 8th February, 2003.

17. The plaintiffs in the suit as also defendant no.2 agreed to the sale of the suit premises by public auction or private treaty only on the condition that the sale proceeds be deposited in the Court to be paid to the party who is held entitled to receive the sale proceeds. The Advocate for defendant no.7 however, then contended that the premises cannot be sold to a third party since he claims his right of possession therein under the Leave and License Agreement dated 8th February, 2003. The plaintiffs oppose the sale to the defendant no.7 as the sale would not fetch a competitive price which could be got only in an auction.

18. It is therefore seen that the application totally lacks bonafides. The alternative relief of sale of the aforesaid premises is required to be made only in favour of the defendant no.7 who is in actual possession. The

relief in prayer (b) of the Notice of Motion does not reflect that fact. In fact the relief, being an alternate relief to the relief of discharge of the Court Receiver, is made out as a relief of practical convenience pending the suit. The application for sale of any premises pending the suit cannot be made unless it can fetch the highest price it is capable of. Such price cannot be obtained unless the property is vacant and possession can be delivered to the purchaser. The possession of defendant no.7 is itself inconsistent with the saleability of the said premises. It is a factor that would militate against obtaining the best price for the said premises. The said premises cannot be sold only to the defendant no.7. That is not even the prayer in the Notice of Motion. The very prayer in the Notice of Motion is frustrated by the defendant no.7 opposing the sale in favour of an outsider.

19. In view of the aforesaid chronology and in view of the fact that the defendant no.1 owes various financial institutions including defendants 2 to 6 also large sums of money, the Court Receiver cannot be discharged pending the suit.

20. Hence, the Notice of Motion is dismissed with costs fixed at Rs.3000/- condition precedent.

(SMT.ROSHAN DALVI, J.)